

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2007-0151, State of New Hampshire v. Kerry W. Kidd, the court on December 21, 2007, issued the following order:

The defendant, Kerry W. Kidd, appeals his conviction for aggravated felonious sexual assault. He argues that the trial court erred in admitting: (1) a photograph taken five years before trial; and (2) opinion testimony that he had wrestled with the victim in an inappropriate manner. We affirm.

A trial court has broad discretion to determine the admissibility of evidence; we review its decision to admit evidence under our sustainable exercise of discretion standard. State v. Miller, 155 N.H. 246, 249 (2007). We accord the trial court considerable deference in determining whether probative value is substantially outweighed by the danger of unfair prejudice. *Id.* at 352.

The defendant first argues that the trial court erred in admitting a picture of him standing with the victim that was taken in the time period of the assault. He does not dispute that the photograph was relevant to show the difference in size between him and the victim. He contends, however, that it had a tendency to instill unfair prejudice because it depicted the image of a young child “looking happy and unafraid while pressed up against [his] side” and because it depicted him with tattoos, cigarettes, a beer in his hand and holding the victim with his other hand.

As the defendant concedes, his defense was that if the sexual assault had occurred, it would have awakened one of the people sleeping in close proximity to the victim. The trial court found that because the victim’s appearance had changed significantly in both height and weight since the assault, the picture was relevant to explain why she did not resist the assault. The court also found that the defendant’s appearance in the picture was not prejudicial and further that his depiction with his arm around the victim was not scandalous given the testimony that had already been presented that “these people were close, they were all friends.” Based upon the record before us, we find no error in this ruling.

The defendant also contends that it was error to admit lay opinion testimony that he was wrestling with the victim and her friend in “an inappropriate manner.” Even if we assume that admission of this testimony was error, we conclude that it was harmless. See State v. Wall, 154 N.H. 237, 245 (2006) (error harmless if State establishes beyond reasonable doubt that

alternative evidence of defendant's guilt is of overwhelming nature, quantity or weight, and if inadmissible evidence is merely cumulative or inconsequential in relation to strength of State's evidence of guilt).

Given the victim's detailed description of the assault, her testimony that the defendant later apologized to her, her repeated reports of the assault in the ensuing years and the corroborating testimony of others concerning both her reports and the change in her demeanor following the assault, we conclude that any error was harmless.

Affirmed.

DALIANIS, DUGGAN and HICKS, JJ., concurred.

**Eileen Fox,
Clerk**